IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARJORIE I. SHIREY and KENNETH E. SHIREY, Appellants, MARK SHIREY SHIRILAU, Plaintiff, v. PORT OF SEATTLE, a Washington Municipal Corporation; AMERICAN BUILDING MAINTENANCE CO. - WEST, a California Corporation; and MARSHA D. DICKERSON dba Dickerson's Maintenance Engineering Service, Respondents.	)	No. 56159-6-I DIVISION ONE UNPUBLISHED OPINION FILED: July 3, 2006

GROSSE, J. – In general, liability for failing to maintain a business in a reasonably safe condition requires a plaintiff to prove that the unsafe condition was caused either by the proprietor or its employees, or that the proprietor had actual or constructive notice or knowledge of the dangerous condition. There is an exception to this general rule of showing actual or constructive notice for self-service stores requiring only that the unsafe condition on the premises is reasonably foreseeable. But this exception requires a relationship between the hazardous condition and the self-service mode of operation of the business.

Here, the Shireys fail to produce evidence of actual or constructive notice

and, also fail to produce evidence from which a trier of fact could logically infer that the nature of the business and the method of operation in the baggage claim area of the airport is such that an ice cream spill is reasonably foreseeable. The summary judgment is warranted, and as such the decision of the trial court is affirmed.

FACTS

The Port of Seattle (Port) operates Seattle-Tacoma International Airport (SeaTac). The Port contracted with American Building Maintenance Co.-West, Inc. (ABM) for janitorial services for the main terminal building at the airport. The baggage claim area is located in this terminal.

On Saturday, September 1, 2001, shortly after 3:30 p.m., Marjorie and Kenneth Shirey arrived at SeaTac airport after flying from their home in California. They walked from the plane to the baggage claim area. Mr. Shirey retrieved their luggage from the baggage carousel and Mrs. Shirey waited near an escalator. After Mr. Shirey retrieved the luggage, he and his wife began to exit the terminal to catch a hotel shuttle bus. Marjorie Shirey slipped and fell, on what she said was a "mess of ice cream" that she later described as a grapefruit sized glob of ice cream. Unfortunately, Marjorie Shirey's fall resulted in substantial injury, including a broken pelvis.

In their brief before this court, the Shireys are critical of the fact that at the time of the slip and fall the public was free to buy food and drinks and carry them throughout the airport. However, this argument is based on an unsupported

assumption that the ice cream necessarily came from a vendor at the airport. Where the ice cream came from is unknown and not particularly relevant to the claim.

The Port and ABM confirm there are spills from people carrying food and drink in the airport. SeaTac keeps a maintenance duty log and incident reports. During the five years prior to the incident, the maintenance logs illustrated that there were a number of slip and falls at the airport, thirteen in the baggage claim area, but only three of these baggage claim area slip and fall incidents were related to substances on the baggage claim area floor, one of those being an electrical cord. The other incidents usually involved running or tripping over suitcases or the carrying of heavy or odd-sized luggage.

The log and the incident report lists Mrs. Shirey's fall as having occurred at 3:49 p.m. ABM noted there is a comprehensive floor inspection and cleaning routine at SeaTac. The accident occurred during the swing shift. There were two janitorial employees on duty in the area. Between 2:30 and 3:30 p.m. the normal cleaning schedule for the baggage claim area required both janitors to check seating areas and stairs between escalators, and check the terrazzo floors as they went. There is nothing in the record to indicate the janitors did not keep to their normal routine.

In addition to the janitorial staff, all Port employees are supposed to report any spills to a central dispatcher, who in turn dispatches a maintenance person to clean up the spill. Other airport employees and supervisors are supposed to

canvas the airport looking for spills or hazards as they walk through the facility.

On July 18, 2003, the Shireys and their son Mark Shirey Shirilau, acting pro se, filed a lawsuit against the Port, ABM, a subcontracted maintenance company and HOST Marriott Corporation. A year later the Shireys retained counsel. A default judgment was taken against the subcontracted maintenance company. The Shireys' son, Mark, stipulated to his dismissal from the action. HOST Marriott was dismissed from the lawsuit, as was the Port, because the Shireys failed to serve their notice of claim on the proper designated agent.

A second complaint for damages directed against the Port began with the filing of a notice for claim for damages with the Port in August 2004. The underlying lawsuit against the Port was filed with the Clerk of the King County Superior Court on October 27, 2004. As in the prior complaint, the Shireys claim that the Port, as owner and operator of SeaTac, negligently failed to maintain the premises in a reasonably safe condition resulting in various injuries and damages.

In January 2005, the Port and ABM sought dismissal of the claims against them on summary judgment. In response, the Shireys filed a response, which included the declaration of the Shireys' expert, Robert Smith, P.E. This declaration discussed the history of slip and falls at SeaTac for the five years prior to the accident. He discussed the terrazzo floors and procedures used at SeaTac as well as flooring and procedures used at other business locations. Smith opined that there were ways that SeaTac could have eliminated potentially

dangerous conditions. He also opined that Mrs. Shirey did nothing wrong.

After hearing, the trial court granted summary judgment dismissing the Port and ABM. The Shireys filed a motion for reconsideration, which was denied. An amended order of dismissal correcting a clerical error was filed June 8, 2005. The Shireys appeal.

ANALYSIS

"'The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.'"[1]

The Shireys contend the trial court erred in dismissing their claim against the Port and ABM because they presented sufficient evidence from which a jury could conclude that one or both of the defendants were negligent when they failed to maintain the premises in a reasonably safe condition for their invitee. We disagree and affirm.

A cause of action for negligence requires a plaintiff to establish: (1) the existence of a duty owed; (2) breach of that duty; (3) a resulting injury; and (4) a proximate cause between the breach and the injury.[2] Whether or not the duty element exists in the negligence context is a question of law that is reviewed de novo.[3] Therefore, the threshold determination of whether the Port and/or ABM owed a duty to Marjorie Shirey, under the specific facts, is also a question of

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[1] Aba Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006) (quoting Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)).
[2] Pedroza v. Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984).
[3] Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).
[4] Degel v. Majestic Mobile Manor, 129 Wn.2d 43, 48, 914 P.2d 728 (1996); Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 220, 802 P.2d 1360

law.[4]

In premises liability actions, a person's status determines the scope of the duty of care owed by the possessor of that property.[5] Here, there is no dispute that Marjorie Shirey was a business invitee to the Port's premises when she fell.

(1991).
[5] Kamla v. Space Needle Corp., 147 Wn.2d 114, 125, 52 P.3d 472 (2002).

The duty of care to a business invitee is to exercise reasonable care to protect invitees from dangers that are known to the owner, and that are not open and obvious to the invitee. Our State Supreme Court set forth the test found in Restatement (Second) of Torts § 343 (1965), in Tincani v. Inland Empire Zoological Society, [6]

> [a] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, [the possessor]:
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover, or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

In general, reasonable care requires a landowner to inspect for dangerous conditions, followed by repair, safeguards or warnings necessary for the invitee's protection under the circumstances.[7]

The issue here is whether the Shireys presented sufficient evidence to create a material question of fact regarding the duty owed by the Port and ABM to Shirey. The Shireys first claim the trial court erred in determining that the Port and ABM did not have actual or constructive knowledge of a defective or dangerous condition on the premises.

Liability for failing to maintain a business premises in a reasonably safe condition requires a plaintiff to prove that either the unsafe condition was caused

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[6] Tincani, 124 Wn.2d 121, 138, 875 P.2d 621 (1994).

[7] Fredrickson v. Bertolino's Tacoma, Inc., 131 Wn. App. 183, 189, 127 P.3d 5 (2005) (citing Tincani, 124 Wn.2d at 139; Restatement (Second) of Torts § 343, cmt. b).

by the proprietor or its employees, or that the proprietor had actual or constructive knowledge of the dangerous condition.[8] Here, there is no allegation that employees of the Port or ABM caused the ice cream spill. Further, the Shireys do not claim that the Port and ABM had actual knowledge of the dangerous condition. However, the Shireys maintain that the Port and ABM had constructive knowledge of the dangerous condition.

> Constructive notice arises where the condition "has existed for such time as would have afforded [the proprietor] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.[9]

In order to prevail on summary judgment, the Shireys must establish that the Port or ABM had, or should have had, knowledge of the dangerous condition in time to remedy the situation before the injury or to warn the Shireys of the danger.[10] Ordinarily it is a question of fact for the trier of fact whether, under the circumstances, a defective condition existed for a sufficient time so that it would have been discovered if reasonable care had been exercised.[11] But the Shireys fail to provide any evidence or reasonable inference that the condition was present for a sufficient period of time during which the ice cream should have been discovered under the circumstances of a busy airport. Originally, Mrs. Shirey indicated that the ice cream was the size of a grapefruit, and that it might

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[8] Pimentel v. Roundup Co., 100 Wn.2d 39, 49, 666 P.2d 888 (1983).
[9] Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 652, 869 P.2d 1014 (1994) (citing Smith v. Manning's, Inc., 13 Wn.2d 573, 580, 126 P.2d 44 (1942)).
[10] Ingersoll, 123 Wn.2d at 652 (citing Brant v. Market Basket Stores, Inc., 72 Wn.2d 446, 451-52, 433 P.2d 863 (1967)).
[11] Frederickson, 131 Wn. App. at 189 (citing Coleman v. Ernst Home Ctr., 70 Wn. App. 213, 220, 853 P.2d 473 (1993)).

have been there for some time, but in her brief she now claims the ice cream was completely melted. Unfortunately, there are no other witnesses of record to the ice cream other than Mrs. Shirey. There is no evidence of how long the ice cream had been on the floor, or any observation of the ice cream by anyone other than Mrs. Shirey. The Shireys can only speculate as to how long the ice cream was present. A reasonable inference is that because the ice cream was said to be the size of a grapefruit, and in the form of a "blob," it had not been on the floor for any appreciable amount of time. Even had the ice cream been "completely melted" there is no evidence that it was there for an appreciable amount of time or whether the source of the ice cream came from inside or outside of the airport. The Port and ABM did not have constructive notice of the spill.

The Shireys claim they do not need to show actual or constructive notice because the danger of slipping on the terrazzo floor from a liquid or icy substance was unreasonable or reasonably foreseeable. There is an exception to the requirement of showing actual or constructive notice. It is the so-called self-service exception or mode of operation rule. This exception was first set forth in Ciminski v. Finn Corp.[12] In that case the plaintiff slipped and fell on a liquid substance near a counter in a cafeteria-style restaurant. This court held that in such a self-service situation, where the risk is inherent to the mode of operation of the business, the plaintiff did not have to prove notice. With one

[12] Ciminski v. Finn Corp., 13 Wn. App. 815, 537 P.2d 850 (1975).

significant difference, the Washington Supreme Court adopted a similar rule in Pimentel v. Roundup Co.[13] The Pimentel court eliminated the need for constructive notice in certain instances, holding that "notice need not be shown . . . when the nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable."[14] But the Pimentel court set forth the difference between its holding and the Ciminski holding:

> The Ciminski decision contains language which suggests that the requirement of showing notice is eliminated as a matter of law for all self-service establishments. 13 Wn. App. at 820-21. This is not the conclusion we reach under the analysis adopted here; the requirement of showing notice will be eliminated only if the particular self-service operation of the defendant is shown to be such that the existence of unsafe conditions is reasonably foreseeable.[15]

As noted in the Ingersoll case, a slip and fall in a shopping mall:

> [E]ven if the injury does occur in the self-service department of a store, this alone does not compel application of the Pimentel rule. Self-service has become the norm throughout many stores. However, the Pimentel rule does not apply to the entire area of the store in which customers serve themselves. Rather, it applies if the unsafe condition causing the injury is "continuous or foreseeably inherent in the nature of the business or mode of operation." Wiltse v. Albertson's, Inc. [116 Wn.2d 452, 461,805 P.2d 793 (1991)]. There must be a relation between the hazardous condition and the self-service mode of operation of the business.[16]

The Pimentel rule was also recognized in Arment v. Kmart Corporation.[17] In

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[13] Pimentel, 100 Wn.2d 39 (involving a paint can falling from a store shelf and landing on the foot of the plaintiff).
[14] Pimentel, 100 Wn.2d at 49.
[15] Pimentel, 100 Wn.2d at 49-50.
[16] Ingersoll, 123 Wn.2d at 653-54.
[17] Arment, 79 Wn. App. 694, 696, 902 P.2d 1254 (1995).

Arment, this court indicated that "if the business where an injury occurs is a self-service operation, the plaintiff is relieved of her burden of establishing a proprietor's actual or constructive knowledge of an unsafe condition if she can show that the business' operating procedures are such that unreasonably dangerous conditions are continuous or reasonably foreseeable."[18]

After defendants move for summary judgment it is their initial burden to show the absence of a genuine issue of material fact. Here, the Port and ABM met this burden by showing an absence of evidence to prove actual or constructive notice. It then becomes the Shireys' burden to show the existence of a material fact. Here, Mrs. Shirey attempted to meet the burden by bringing herself within the self-service exception of Pimentel, by alleging that SeaTac, particularly the baggage claim area, is a self-service operation. But it is not self-service that is the key to the exception. It is the question of whether the nature of the business and the method of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable.[19] Here, through use of her expert, Mrs. Shirey attempts to set forth statistical information in support of her claim, and while it is true that at some point statistics might establish foreseeability and a lack of safety, it is not so in this case. Here, Mrs. Shirey fails to produce evidence from which a trier of fact could reasonably infer that the nature of the business and the method of operation of the baggage claim area or airport are such that unsafe conditions such as encountered here

[18] Arment, 79 Wn. App. at 696 (citing Pimentel, 100 Wn.2d at 40).
[19] Arment, 79 Wn. App. at 697.

are reasonably foreseeable in the area in which she fell. Although the Shireys contend on appeal that the injury was reasonably foreseeable because the Port did not

prevent customers from taking food and beverage away from vendors, and allowed the items to be carried throughout the airport, the Shireys failed to produce evidence of the Port's policies or mode of operation to support the contention. Nothing in the evidence submitted in opposition to summary judgment suggests that the Port encouraged or specifically allowed customers to carry food to all portions of the airport. The Port cannot control the actions of every person coming or going from the premises. There is no evidence of any connection between the ice cream spill in the baggage claim area and a policy or mode of operation in the baggage claim area that would make this particular unsafe condition reasonably foreseeable.

> The fact that a business is a self-service operation is insufficient, standing alone, to bring a claim for negligence within the Pimentel exception. The Pimentel exception is a narrow one, limited to specific unsafe conditions in specific areas that are inherent in the nature of self-service operations. In order to fall within the Pimentel exception, therefore, a plaintiff must show that the nature of the particular self-service operation is such that it creates reasonably foreseeable unsafe conditions in the self-service area of the business. While certain departments of a store, such as a produce department, are "areas where hazards were apparent and therefore the owner [is] placed on notice by the activity," it does not follow that specific unsafe conditions associated with a self-service business are reasonably foreseeable in all areas of the business. On the contrary, to invoke the Pimentel exception, a plaintiff must present some evidence that the unsafe condition in the particular location of the accident was reasonably foreseeable.[20]

The Shireys fail to produce any evidence from which a trier of fact could reasonably infer that the nature of the business and methods of operation of the airport are such that unsafe conditions are reasonably foreseeable in the area in

[20] Arment, 79 Wn. App. at 698 (citations omitted.)

which she fell. The exception found in Ciminski, as modified by the Washington Supreme Court in Pimentel, does not apply under the facts before the court.

We affirm the trial court's order granting the Port and ABM's motion for summary judgment.

Grosse, J

WE CONCUR:

Appelwick, C.J.

Ellington, J